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SUING THE SOVEREIGN FROM THE LATIN AMERICAN PERSPECTIVE

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I. INTRODUCTION

In these remarks, I will comment on the papers of Professors Jackson and Pfander by analyzing the topic of “suing the sovereign” from the Latin American perspective. This analysis requires a comparison, and comparisons by their very nature are difficult and challenging as words have different meanings in different languages. The Italian expression “traduttore traditore,” or “the translator is a traitor,” comes to mind.

Without entering into additional complex issues that arise when attempting to make cross-cultural comparisons, one issue that is especially important is what I will call the “hierarchy trap.” The relative importance of an issue—in terms of its priority—may differ greatly from one legal system to another. In any comparative analysis, one must always keep in mind the relevance of the issue being compared in light of the specific priorities facing any one society at a given time. Failure to recognize the importance of this trap results in a distorted analysis because even if the issues are treated similarly in each society under comparison, such issues may not be a priority in one of the societies. In addition, words taken in isolation compound the issues involved in a comparison. Words can be similar, but for an accurate comparison, we need to identify not only who is in charge of their interpretation and the proper role of the courts, but also the enforcement agencies and what occurs in practice.

To limit the serious issues raised when making a comparison, these remarks do not “merely compare,” but instead present the key issues facing Latin American societies in general, with regard to the general topic of this conference: “Suing the Sovereign.” Part II presents these key issues. Part III discusses the creation and role of the Inter-American system of human rights. Part IV covers the

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law of torts; and finally, Part V will address the goals for the future in Latin America.

II. KEY ISSUES FACING LATIN AMERICA

The most relevant issue challenging Latin America concerning the topic of this conference relates to the consequences of the widespread, mass, and gross human rights violations that took place in the region in the 1970s and 1980s.¹ Those mass violations include disappearances, summary executions, and torture by government officials. In this respect, Professor Pfander's description of the Romanian experience evokes similarities.²

Based on this historical framework, several problems emerge. The first is one of jurisdiction, and in particular how to exclude military courts from judging civilians or military personnel who commit crimes against civilians. This is a crucial point in any analysis about the broader topic of "suing the sovereign." Jurisdiction by military courts over claims brought by civilians at the hands of government officials generally result not in justice but in punishment of civilians and impunity for the military.

As Latin American countries have replaced authoritarian governments and resorted to free elections (in all countries except Cuba), military jurisdiction needs to be restored to its proper role, namely, adjudication of acts committed by military personnel in the performance of their duties that do not affect civilians. Due process requires that all claims based on alleged arbitrary governmental actions, including those acts done by the military, be decided by civil courts.

A second issue concerns the legal regime that regulates emergency situations; situations that, inter alia, allow for the suspension of some individual rights. Latin American constitutions generally enumerate, in an exhaustive fashion, the rights to be protected.³ These include both substantive rights (e.g., freedom of speech, right to life, prohibition of torture, prohibition of discrimination, equality of the law), as well procedural norms to ensure that the government cannot infringe upon such rights arbitrarily, without

1. See generally Antonio Ramiro Brotóns, *EL CASO PINOCHET: LOS LÍMITES DE LA IMPUNIDAD* (1999); Iain Guest, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (1990).

2. See James Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 *GEO. WASH. INT'L L. REV.* 611, 626 (2003).

3. See generally CHILE CONST., ch. III, art. 19; COSTA RICA CONST., tit. IV; HOND. CONST., tit. III; PERU CONST., § I.

full compliance with due process guarantees. Guarantees to ensure compliance include the writ of habeas corpus, which protects personal freedom, and *amparo*, a writ that allows for expeditious protection of all constitutional rights.⁴ Once a government declares an "emergency," however, both individual rights and procedures can be suspended to some degree. Significantly, numerous constitutional provisions define the term "emergency" extremely broadly, allowing for the denaturalization and abuse of the emergency provisions, the valid purpose of which is to protect real threats to a nation. Accordingly, it is imperative to review the provisions of Latin American constitutions that involve emergency situations to ensure full compliance with their valid goals. In particular, three points are relevant: (1) the conditions necessary to declare an emergency; (2) rights that can never be derogated; and (3) the tests required to suspend certain rights. The distribution of power amongst the three branches of government in all of these instances is equally relevant, as the lack of judicial review and the exercise of a supervisory role by the particular legislature becomes even more relevant during an emergency. In this regard, as with other points raised in these remarks, international law, and in particular, human rights law, provides guidance. In accordance with international law, a declaration of emergency is valid only when there is a threat to the life of the nation.⁵ Some fundamental rights (i.e., prohibition of arbitrary execution and prohibition of torture) as well as procedural guarantees essential for the protection of those rights cannot be derogated.⁶ Other rights can only be suspended when complying with the tests of necessity, proportionality, and timeliness.⁷

A third issue of significance is the need for a strong and independent judiciary, as Professor Jackson discusses in great detail in

4. See *Habeas Corpus in Emergency Situations*, Advisory Opinion, Inter-Am. C.H.R. OC-8/87/ser. A/No. 8 (Jan. 30, 1987); see also *American Convention on Human Rights*, Inter-American Specialized Conference on Human Rights OEA/Ser.L/V/1.4 rev 8, at 23, 2001 (Nov. 22, 1969).

5. See *American Convention on Human Rights*, *supra* note 4, art. 27(1); see also Claudio Grossman, *A Framework for the Examination of States of Emergency under the American Convention on Human Rights*, 36 AM. U. J. INT'L L. & POL'Y 35 (1986).

6. See *American Convention on Human Rights*, *supra* note 4, art. 27; *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. OHCHR, 21st Sess., art. 15 (Dec. 16, 1966); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Eur. Consult. Ass. (1950).

7. See Claudio Grossman, *States of Emergency: Latin America and the United States*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (L. Henkin & A. Rosenthal eds., 1990).

her paper.⁸ In the end, the best way of securing individual freedoms is the existence of independent judges to whom one can resort in order to seek relief. Rich theoretical debate persists regarding the requirements for an independent judiciary. Common questions include whether life tenure and proper financial compensation are indispensable requirements.⁹ In the end, however, it is the rich and permanent debate existing in a democratic society that provides the best framework for achieving an independent judiciary.¹⁰

In Latin America, which finds itself in a process of democratization and transition, as stated above, international norms and procedures create important protections in the case of emergencies and in other issues raised when "suing the sovereign," e.g., state accountability, due process, and equality before the law. The role of international law, discussed at great length by Professor Pfander¹¹ has increased in Latin America as a result of the democratization process that has contributed to the development of new societal actors, including non-governmental organizations (NGOs) and professional groups, which can act in the domestic and international realm to sue the sovereign.

III. THE INTER-AMERICAN SYSTEM

The Inter-American system of protection of human rights plays an important role in suing the sovereign. The Organization of American States (OAS), the regional organization in the Western hemisphere developed by the American States, provides in its Charter that "respect for the fundamental rights of each individual on the basis of the principles of equality and nondiscrimination is the cornerstone of democracy and a fundamental principle of the organization."¹²

In 1947 the American States started to develop a "regional bill of rights," through the adoption of the American Declaration of the

8. See generally Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003).

9. See U.S. CONST. art. III, § 1.

10. Cf. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

11. Pfander, *supra* note 2, at 635-648.

12. *Charter of the Organization of American States*, pmb. & art. III(k), OAS OEA/Ser.L/V/I.4 rev 8 (May 2, 1948).

Rights and Duties of Man.¹³ In 1969 the American Convention on Human Rights¹⁴ (or Pact of San José, Costa Rica) was adopted and ratified by all Latin American countries¹⁵ and entered into force on July 18, 1978. To address issues concerning special rights or the rights of vulnerable groups, other treaties were adopted: (1) the Inter-American Convention to Prevent and Punish Torture;¹⁶ (2) the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women¹⁷ (Convention of Belém do Pará); (3) the Inter-American Convention on Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights¹⁸ (Protocol of San Salvador); (4) Protocol to the American Convention on Human Rights to Abolish the Death Penalty;¹⁹ (5) the Inter-American Convention on Forced Disappearance of Persons;²⁰ and (6) the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.²¹ To supervise compliance with these treaties, the American States created two supervisory organs to establish state responsibility: (1) the Inter-American Commission of Human Rights (the Commission or IACHR), a principal organ of the OAS in the human rights arena²² and (2) the Inter-American Court of Human Rights, which has jurisdiction only when a state has accepted the Court's compulsory jurisdiction.²³

13. *American Declaration of the Rights and Duties of Man*, International Conference of American States, OEA/Ser.L/V/I.4 rev 8, at 15, 2001 (1948).

14. *American Convention on Human Rights*, *supra* note 4.

15. The parties to the Convention are Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *See Id.*

16. *Inter-American Convention to Prevent and Punish Torture*, OAS OEA/Ser.L/V/I.4 rev 8, at 83 (Dec. 9, 1985).

17. *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, OAS OEA/Ser.L/V/I.4 rev 8, at 101, 2001 (June 9, 1994).

18. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, (Protocol of San Salvador)*, OAS OEA/Ser.L/V/I.4 rev 8, at 65, 2001 (Nov. 17, 1988).

19. *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OAS OEA/Ser.L/V/I.4 rev 8, at 79, 2001 (June 8, 1990).

20. *Inter-American Convention on Forced Disappearance of Persons*, OAS OEA/Ser.L/V/I.4 rev 8, at 93, May 2001 (June 9, 1994).

21. *Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities*, OAS OEA/Ser.L/V/I.4 rev 8, at 111, May 2001 (June 7, 1999).

22. *Charter of the Organization of the American States*, *supra* note 12, art. 106.

23. *See* Inter-Am. C.H.R., art. 2, OEA/ser.L/v./III3,doc.13corr.1 (1980); *American Convention on Human Rights*, *supra* note 4, art. 61-63.

According to the regulations of the Commission, "any person or group of persons or any non-governmental organization legally recognized in one or more of the member states of the Organization may submit a petition to the Commission" against a state, alleging a violation of an internationally-protected right under the Pact of San José, Costa Rica, if that treaty has been ratified by the state.²⁴ The Commission reviews the petition and if the Commission decides that a state is responsible for violating human rights, it recommends remedial action by the state.²⁵ If the state fails to follow the Commission's recommendations, the Commission then has the option of either publicizing its findings or referring the case to the Inter-American Court.²⁶

The cases presented to the Inter-American Court have shaped the development of state accountability for human rights violations and helped establish several important principles. For the purposes of these remarks, it is important to note that the Court has required that states have a legal system that guarantees that individuals can successfully "sue the sovereign" when their internationally-protected rights have been violated. This principle was stated by the Inter-American Court in *Velásquez Rodríguez*,²⁷ a case against Honduras. Manfredo Velásquez Rodríguez, a university student in Honduras, was kidnapped and detained by members of the National Office of Investigations and the Armed Forces of Honduras on September 12, 1981, and was neither seen nor heard from again.²⁸ Relatives of Velásquez Rodríguez brought a case to the Commission, which eventually made its way to the Inter-American Court, claiming that between 1981 and 1984 there was a "systematic and selective practice of disappearances carried out with the assistance or tolerance" of the Honduran government.²⁹ The Court decided that Honduras was responsible for the disappearance of Velásquez Rodríguez.³⁰ The Court's decision shaped an important principle of state responsibility on the basis of interpreting the ini-

24. Rules of Procedure, Inter-Am. C.H.R., art. 23, OEA/Ser.L./V/I.4, doc. 134 rev. 8 (2001).

25. *Id.* art. 43(2).

26. *Id.* arts. 44-45.

27. *Velásquez Rodríguez v. Peru*, Judgment of July 29, 1988, Inter-Am C.H.R. (ser. C) No. 4 (1988).

28. *Id.* para. 3.

29. *Id.* para. 119(a); see also Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 HASTINGS INT. & COMP. L. REV. 363 (1992).

30. *Velásquez Rodríguez*, *supra* note 27, para. 148.

tial paragraph Article 1 of the American Convention on Human Rights.³¹

Article 1(1) of the American Convention on Human Rights, entitled "Obligation to Respect Rights," provides the following:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.³²

In its decision, the Inter-American Court stated that:

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.³³

Moreover, interpreting the duty of the States Parties to "ensure" the rights recognized by the American Convention, the Court decided that:

This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted by damages resulting from the violation.³⁴

In sum, the Court found that based on Article 1(1), responsibility for a violation of certain rights can be imputed to the State Party and the State Party has the duty to ensure compliance with the rights recognized in the Convention.

Additionally, the Inter-American system has contributed to the possibility of suing the sovereign by interpreting numerous provisions of the American Convention including Article 8 (Right to a

31. American Convention on Human Rights, *supra* note 4, art. 1(1).

32. *Id.*

33. Velásquez Rodríguez, *supra* note 27, para. 164.

34. *Id.* para. 166.

Fair Trial),³⁵ Article 5 (Right to Humane Treatment),³⁶ and Article 25 (Right to Judicial Protection).³⁷ These decisions were incorporated into the domestic realm in different countries through mechanisms that include the adoption of legislation, judicial decisions, and successful arguments presented by lawyers in domestic proceedings. The role of international law in this arena has been made possible by the growing openness of Latin American societies as well as a constant process of development of domestic norms and procedures that have both contributed to that openness and been reinforced by it. Such developments have taken place both in contract cases where the Latin American countries have permitted suits against the sovereign when the government entered into a contractual relationship and in torts cases.

IV. THE LAW OF TORTS

Suing the sovereign in tort in domestic courts is not a child of statutory law. In the Latin American region, tort liability for governmental acts, or the literal translation from the Spanish, "extra-contractual responsibility," was generally-speaking and certainly up until the 1950s, shaped by judges themselves. Although in Latin America, constitutions have proliferated, Civil Codes have not changed dramatically. Essentially, Civil Codes in Latin America have assumed a similar role to that of constitutions in other areas of the world. This fact raises serious issues because Civil Codes respond to a societal vision that includes absolute freedom to contract and recognizes mainly formal equality of all parties. This normative vision collides with the *need* to achieve gender equality, the special provisions required to protect the weaker party in a labor relationship, and providing protection in contracts of adhesion (where one party basically dictates the conditions for obligations). Satisfaction of these needs often requires rejection of some of the principles on which the Civil Code was based. Difficulties in legislative reform stress the importance of reinterpreting Civil Code provisions in order to adapt them to the realities of a modern society. Specifically, this applies to the law of torts, as the legal provisions developed in the twentieth century were insufficient insofar as they

35. See Raquel Martín de Mejía v. Perú, Case 10.970, Inter-Am. C.H.R. 157, OEA/Ser.L/V/II.91.doc. 7 rev. (1996).

36. See Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Inter-Am. C.H.R. 821, OEA/Ser. L/V/II.98, doc. 7 rev. (1998).

37. See Gustavo Carranza v. Argentina, Case 10.087, Inter-Am. C.H.R. 254, OEA/Ser. L/V/II.9, doc. 7 rev. (1998).

did not allow individuals to sue the sovereign. Through interpretation, the judiciary started to allow for cases where civil servants acted with malice or negligence, a required subjective component in the Civil Code. A learned audience such as this one, however, knows very well that even though this was a step forward in the attempts to allow individuals to sue the sovereign, the requirements of malice and negligence restricted state responsibility to cases against civil servants *who* were responsible for acting “irresponsibly.” Serious problems of proof, sometimes insurmountable, were a serious hurdle for success in litigation.

During the wave of democratization from inter alia the rejection of authoritarianism in the region and the ensuing possibilities for the expansion of human freedom in Latin America, statutory developments in the area of state responsibility commenced, expanding the scope of liability beyond the strait jacket of the Civil Code. Many Latin American countries seek to constitutionalize all provisions related to suing the sovereign.³⁸ An example is the Chilean Organic or Basic Law of the Administration.³⁹ Article 44 of this statute (in line with the French tradition) allowed for state responsibility for the tort of “lack of service.”⁴⁰ This type of liability does not require proof of “guilt or malice;” instead, the failure of the state to provide “needed” services must be established.⁴¹ These developments, however, have not been homogeneous. For example, the same law in Chile that established “lack of service” as a basis for liability also immunized the armed forces and the police from such liability. We see then an interesting interplay or relation between classic notions and new developments resulting from evolving political realities when new and old realities are present.⁴² Interestingly, since 1949, Costa Rica had a special jurisdiction for

38. Costa Rica made progress in this area in 1949 with Article 49 of the Constitution and subsequent reforms during the 1960's. See Dr. José Enrique Rojas Franco, *LA SUSPENSIÓN DEL ACTO ADMINISTRATIVO EN LA VÍA ADMINISTRATIVA Y JUDICIAL*, 27 (4th ed. 1999); see also COSTA RICA CONST. art. 49.

39. Ley Orgánica Constitucional de Bases Generales de la Administración del Estado, No. 18.575, art. 44 (2000) (Chile).

40. See generally Pedro Pierry Arrau, *Algunos Aspectos de la Responsabilidad Extracontractual del Estado por Falta de Servicio [Certain Aspects of the Extracontractual Responsibility of the State for Failure to Provide Service]*, REVISTA DE DERECHO Y JURISPRUDENCIA Y GACETA DE LOS TRIBUNALES (July 2000).

41. *Id.*

42. In Chile there is a relevant case involving acts committed by the members of the army against three primary school teachers who were killed and disappeared. In that case, the judges interpreted the provisions of the Civil Code, in particular Article 2320, which allows for liability for judicial persons.

suing the sovereign.⁴³ Article 1 of the Costa Rica Constitution clearly describes Costa Rica as a responsible state, thus a party may sue it.⁴⁴ In 1978 Costa Rica passed the new General Public Administration Law, which described the standards required for suing the sovereign and abandoned all of those described in the Civil Code.⁴⁵

V. THE FUTURE

The current debate in many Latin American societies is whether the notion of "lack of service" is enough to "sue the sovereign" in all cases. Proponents of an expansive notion of state responsibility hold that liability should just require the establishment of facts, damages, and a causal relationship with state action, without the need for "lack of service." For some the debate takes place between those who adhere to a philosophical conception of absolute individual freedom and those who continue to believe that the states should play a role as the ultimate decisionmaker in the distribution of the state resources, as they believe that this broadening of liability will result in individuals deciding how the societal resources should be spent. Additionally, tension continues to exist between those that want a new publicly-based notion of state responsibility and those who continue to uphold the value of the principles of the Civil Code. From that perspective, the debate impacts the discussion of whether special jurisdiction to sue the sovereign is needed. For those who reject the Civil Code approach, that corpus continues to exercise significant influence on ordinary judges because the conceptual framework under which they tend to operate remains the Civil Code.

43. See COSTA RICA CONST., arts. 1, 49.

44. *Id.* art. 1.

45. See generally Ley General de la Administración Pública, No. 6227 (1978) (Costa Rica).